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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-465

JERSEY CENTRAL POWER & LIGHT CO.,

Cross-Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Other Authority Cited

R. Stern and E. Gressman, Supreme Court Practice: Sec. 6.44, pgs. 310-312 (4th ed., 1969) 3

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Statement

Jersey Central Power & Light Co. (hereafter "company") cross-petitions for a Writ of Certiorari to review that part of the judgment of the United States Court of

Appeals for the Third Circuit which remands the cause for an evidentiary hearing.

Opinions Below

The opinion of the Court of Appeals is reported at 508 F. 2d 687. The decision of the District Court, while officially unreported, appears at 8 Fair Employment Practice Cases 690.

Jurisdiction

The judgment of the Court of Appeals was entered January 30, 1975, and a petition for rehearing was denied March 4, 1975. At the request of the Equal Employment Opportunity Commission (EEOC), Mr. Justice Brennan ordered on May 27, 1975 an extension of time to and including August 1, 1975 in which to file a petition for a writ of certiorari. Under 28 U.S.C. § 2101(c) the 60-day extension which was granted for the filing of a moving petition is the maximum permitted under law. On August 1, 1975, the last day of the aforesaid extension, EEOC filed its petition and therein presented for review an issue quite different from those issues presented to the courts below. Simultaneously, the EEOC seeks to move forward in the District Court below for an evidentiary hearing in order to pursue an inquiry as to whether or not the company-wide seniority system herein was designed or adopted with an intent to discriminate, citing the Circuit's opinion below as the controlling law of the case in this regard. In light of this entire course of conduct and because of the extremely unusual circumstances herein, the company respectfully requests that its cross-petition be considered on the merits, though perhaps technically out of time. *Pierson* v. *Ray*,

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386 U. S. 547, 551 (1967); also see R. Stern and E. Gressman, Supreme Court Practice, Section 6.44 at pgs. 310-312 (4th ed., 1969). In addition to the foregoing cited authority, other reasons for exercising jurisdiction are set forth in Point I of the Reasons for Granting the Writ, *infra*. Certainly, at the very least, this application should be treated as a conditional cross-petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals err by remanding the cause to permit evidence to be adduced by parties in the current litigation on the question of whether the company-wide seniority system was bona fide within the meaning of Section 703(h) of the Civil Rights Act of 1964, in light of its holding that the seniority system of the collective bargaining agreement had been incorporated by the EEOC in the conciliation agreement?

Statute Involved

The following sections of the Civil Rights Act of 1964 are involved and are set forth in relevant part.

Section 703(h), 42 U.S.C. § 2000e-2(h):

> "Notwithstanding any other provision of this Title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations,

provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

Section 706(b), 42 U.S.C. §2000e-5(b):

"If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1):

"If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent named in the charge."

Statement of the Case

For a complete statement of the case, the company refers the Court to the EEOC petition and the company brief in opposition in No. 75-182. Briefly stated here, the company had been charged with unlawful employment practices particularly with respect to hiring. Following an EEOC determination of reasonable cause, the company, the unions and the EEOC executed in December, 1973 a conciliation agreement in resolution of those charges; it contained an EEOC waiver of the right to sue. Shortly thereafter the company was required to reduce its work force by substantial numbers, the anticipated effect of which would be a disparate impact upon minorities if the layoff was accomplished in accordance

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with the company-wide seniority system of the collective bargaining agreement. Confronted by adverse claims from the EEOC and the unions, the company sought judicial guidance by way of declaratory judgment as to its rights and obligations in effecting that layoff, under the conciliation agreement, the collective bargaining agreement, and Title VII. The District Court held that to the extent the two agreements conflicted, the conciliation agreement must prevail and the layoff must be accomplished in such a fashion as to preserve at its conclusion the ratios of minorities and females which existed within the work force just prior to the commencement of the layoff. The unions appealed. The Court of Appeals held that (1) the conciliation agreement was consistent, and not in conflict, with the collective bargaining agreement because it incorporated the company-wide seniority system, (2) a company-wide seniority system providing for layoffs by reverse order of seniority is not contrary to public policy and welfare, and (3) the only challenge available against the company-wide seniority system by any *aggrieved or proper party* would be an attack upon its bona fide character, i.e., evidence directed either to the neutrality of the system or to ascertain an intent or design to disguise discrimination. In its petition to this Court the EEOC urges review of the Court of Appeals' treatment of the Section 703(h) proviso which treatment insulates bona fide seniority systems from attack unless adopted with a design or intent to discriminate. The EEOC construes the decision below to mean that layoffs pursuant to a company-wide seniority system having a disparate impact upon minorities cannot be a violation of Title VII even though that system carries forward post-Act discriminatory practices—unless the system itself was intended or designed to disguise discrimination. In the view of the EEOC, the remand grants it the right to pro-

ceed to an evidentiary hearing on this latter point. If this reading of the remand is correct, it completely overlooks the estoppel implications of the conciliation agreement. On the remand question the court commented in footnote 54 as follows:

> "Our analysis would make it appropriate for *a* district court to have evidence presented in two stages . . . if it is established that the plant-wide seniority system is not bona fide, then at a second evidentiary stage *an aggrieved or proper party* seeking relief may adduce all evidence relevant to a Title VII proceeding, including but not limited to past discriminatory employment practices." 508 F2d 706-707 (Emphasis added.)

Thereafter, the EEOC served interrogatories on the company and the unions but it agreed not to press discovery pending a determination by the Solicitor General as to whether a petition for a writ of certiorari would be filed. (Appendix A.) After the petition was filed on August 1, 1975, the EEOC requested that discovery proceed pursuant to the remand. (Appendix B.)

In its petition the EEOC ascribes post-Act discrimination to the company and contends that because of it the seniority system cannot be bona fide. Thus, the company is now pressed on two fronts with issues it contends the EEOC is estopped from raising by virtue of the conciliation agreement and the EEOC waiver contained therein. In both instances, the key principles of estoppel and waiver are being completely ignored and rendered meaningless.

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REASONS FOR GRANTING THE WRIT

POINT I

The surprising shift of position by the EEOC and the current status of matters necessitates the filing of this Cross-Petition in order to obtain substantial justice.

The decision of the court below treated extensively and disposed of all of the contentions of the EEOC that had been advanced in both the District Court and Circuit Court concerning the conflict between the collective bargaining agreement and the conciliation agreement. The court set forth clear language that the seniority system was incorporated in the conciliation agreement and because of that fact there could be no conflict or complaint about the disparate impact on minorities. One could not be sure that the EEOC would not press on with this point until its time for appeal had expired. Until and unless that particular position was abandoned by the EEOC, the theory of estoppel did not come into play. Thus, once the conflict theory was abandoned by the EEOC, which was not known to the company and did not take place until the filing of the EEOC's instant petition, the theory of estoppel and waiver was not as significant as it has now become. It is true that if one were to speculate that an appeal would not be taken on the issue of conflict, the litigation would then flow in accordance with the Circuit Court opinion at the District Court level where the argument of estoppel might become involved. However, there were two reactions to this possible eventuality: (1) that under all of the circumstances it was simply inconceivable that the EEOC would try to attack the very seniority system that it incorporated in its conciliation agreement,

and (2) that the Circuit Court was not referring in footnote 54 to the current litigants in the instant litigation, *per se*, but rather was setting forth its view, in this setting of a declaratory judgment proceeding, declaring the rights and obligations of the parties, particularly the company and the unions, if there were a Title VII proceeding instituted by an individual not bound by the conciliation agreement. This latter explanation would explain the use of the language of the court in footnote 54 when it speaks of *a* district court and an *aggrieved or proper party.* When the Circuit Court speaks of the District Court below, it refers to it as it did in the closing paragraph of its opinion by the reference *the* District Court. Because of the nature of Title VII rights and the concern of this Court and the Circuit Court as well, as expressed in the *Alexander* v. *Gardner-Denver* decision, 415 U. S. 36 (1974), i.e., the rights of an individual under Title VII, the statements of the court below may be viewed in that context. In either case the need for a petition for certiorari on this point seemed highly unlikely. However, subsequent events have proved otherwise.

In sum, the abandonment of the conflict argument by the EEOC and its effort in the Supreme Court to establish post-Act discrimination, with the simultaneous effort in the District Court, both of which efforts must of necessity go behind the conciliation agreement, force the theory of estoppel to come center stage. It must be disposed of in order to conclude this proceeding as a matter of law.

Significantly, the time sequence and actions taken in these events were in the sole control and cognizance of the EEOC. The surprising shift of position by the EEOC and the current status of matters necessitates the filing of this cross-petition at this time in order to obtain substantial justice.

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POINT II

The court below erred by remanding matters covered in the conciliation agreement for an evidentiary hearing.

Both policy and practicalities dictate a central role for the conciliation process. Congress has mandated and the courts require that the EEOC attempt to resolve charges of unlawful discrimination by conciliation before it can bring suit.[1] As a practical matter, the benefits of the Act would be largely lost if the conciliation process were perceived as an imperfect remedy. The Court may take judicial notice that the EEOC, employers and unions routinely enter into conciliation agreements in resolution of charges affecting millions of employees. It might be of little moment if an individual employee whose charge had been settled attempted to circumvent the settlement agreement. But here we have the EEOC, itself, attempting to go behind an agreement which it executed, and revive issues which have been resolved and which it agreed not to prosecute. The legal principle involved is so elementary and its significance to the successful administration of this Act so obvious that this attempt to prejudice the process by the very agency charged with its administration is nothing short of startling. The company opposes the EEOC petition because the EEOC presents an issue which distorts the record and relies on matters already resolved.[2] Not inconsistently, the company urges review of that portion of the decision remanding for possible

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[1] *EEOC* v. *Westvaco Corp.*, 372 F. Supp. 985 (D. C. Md. 1974); *EEOC* v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (8th Cir. 1974).

[2] See the company's brief in opposition, Points B and C.

examination the seniority system's bona fide character—an opportunity which the EEOC has seized upon and is now pursuing. The company's position is quite simply that the EEOC is estopped from raising the question of the seniority system's bona fide character.[3]

The court below held that the seniority system had been incorporated in the conciliation agreement. Having so held, the court would commit error by then permitting the EEOC to challenge the system's bona fide character. The EEOC cannot now attack the very seniority system which it investigated, it later approved, it incorporated into its conciliation agreement and relied on as one aspect of the overall remedy for the charges which were settled. Because the seniority system is part of the conciliation agreement and since the EEOC has waived its right to sue with respect to all matters contained in that agreement, it would be inconsistent for the court below to open up to the EEOC the question of the bona fides of the seniority system. Now the company, the unions and the EEOC are confronted with needless hearings at substantial expense and time, plus the unwarranted raising of false hopes in laid off employees. Of extreme importance in this matter is the fact that an ancient rule, of great utility in the enforcement of this Act, is being disregarded to the detriment of the conciliation process.

A further compounding of such error below is the fact that a hearing has been directed on an issue for which the answer is self-evident. A company-wide seniority system, such as is involved here, is the purest form of seniority. For whatever purpose it is applied, be it transfer,

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[3] Likewise, it is estopped from relitigating any of the matters contemplated by the Court of Appeals in what it describes as a second evidentiary hearing.

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promotion, layoff, or recall, it measures every employee by a single standard and is completely impartial in its treatment. The Court of Appeals concluded that it was pointless to examine the effects of such a system and limited the inquiry to the question of intent. To this extent, such an inquiry is meaningless here because a neutral company-wide seniority system does not respond to intent. If there is (a) an intent to discriminate, (b) no intent to discriminate or (c) an intent not to discriminate, operationally the effects of such a system will be precisely the same, i.e., the measuring stick of time is the determining factor. Moreover, the fact is that a facially neutral company-wide seniority system can be nothing but bona fide. Stated differently, a facially neutral company-wide seniority system is *per se* bona fide. The proviso in Section 703(h) is undoubtedly intended for lesser kinds of seniority systems, such as departmental or job, or any form of gerrymandered or manipulated seniority which has the capacity and can be intended to discriminate.

CONCLUSION

Review should be granted of the lower court's remand since that portion of the judgment is inconsistent with the remainder of the majority opinion and operates to override the fundamental principles of estoppel and waiver.

Respectfully submitted,

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A Professional Corporation
Attorneys for Cross-Petitioner
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[APPENDICES FOLLOW]

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D. C. 20506

June 13, 1975

Honorable Vincent P. Biunno
United States District Court Judge
United States District Court
District of New Jersey
Post Office Building, Room 411
Federal Court House
Newark, New Jersey 07101

CERTIFIED No. 955732 (Air Mail, Special Delivery)
RETURN RECEIPT REQUESTED

Re: *Jersey Central Power & Light Co.* v. *Local Union 327, I.B.E.W., et al.*, Civil Action No. 74-1083

Dear Judge Biunno:

We have this week received copies of letters to the Court from Jersey Central and from the union defendants, addressing both the Court's jurisdiction in the above-entitled matter and the proper timing for discovery. In our opinion this Court has jurisdiction, the Court of Appeals' mandate having issued and no party having sought a stay thereof. However, we would have no objection to holding discovery in abeyance until the Solicitor General's decision on petitioning for *certiorari*, and to considering the question again at that time.

Respectfully submitted,

JEFFREY H. ORLEANS
Attorney
Legal Counsel Division
Office of General Counsel

cc: Counsel of Record

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D. C. 20506

August 4, 1975

Honorable Vincent P. Biunno
United States District Judge
Post Office Building, Room 411
Federal Court House
Newark, New Jersey 07101

Re: *Jersey Central Power & Light Co.* v. *Local Union 327, IBEW, et al.*, Civ. Action No. 74-1083

Dear Judge Biunno:

On August 1, 1975, the Commission filed a petition for a writ of certiorari in the Supreme Court of the United States. A copy of that petition is enclosed.

In light of the petition we have filed we see no reason for any further delay in conducting discovery. The issues which remain for this Court, following the Third Circuit's remand, are unaffected by the question presented to the Supreme Court. We perceive the issues before this Court to be:

1. Whether the layoff system embodied in the collective bargaining agreement was either designed or intended to disguise discrimination.

2. Whether the layoffs—especially of bargaining unit employees—were necessary at all or whether Jersey Central had a feasible alternative to such layoffs. *See* the Commission's answer to the complaint, dated October 2, 1974.

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These issues, we believe, will remain for determination no matter what the Supreme Court's action on our petition. Accordingly, discovery should now be permitted to proceed, pursuant to the Federal Rules of Civil Procedure.

Very truly yours,

LUTZ ALEXANDER PRAGER
Attorney
Office of the General Counsel

Enclosure

cc: all counsel of record
(without enclosure)

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

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MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

On July 22, 1974, Jersey Central Power & Light Co. filed suit in the District Court of New Jersey for declaratory judgment naming the Equal Employment Opportunity Commission, other government agencies, and the unions with which Jersey Central has collective bargaining agreements as defendants. Jersey Central asked the district court for judgment

declaring its rights and obligations under its collective bargaining agreements, its conciliation agreement with E.E.O.C., Title VII of the Civil Rights Act of 1964, and Executive Order 11246 with respect to the layoff of a substantial number of employees which was about to take place.

On motion for summary judgment the district court held that there was a conflict between the collective bargaining agreement and a later-executed conciliation agreement signed by Jersey Central, the unions, and the E.E.O.C. Applying contract law, the court held that both agreements should be given maximum effect but that the "seniority provisions of the collective bargaining agreement cannot be construed in such a manner as to frustrate the affirmative action commitments contained in the Conciliation Agreement." The court emphasized that it was granting *partial* summary judgment and not terminating the action.

On interlocutory appeal, a panel of the Court of Appeals reversed, finding no conflict between the two agreements. A majority of the panel then undertook to examine whether "an overriding public policy dictates a modification of the collective bargaining agreement." The panel majority held that this question could be answered only by determining whether the layoff system violated Title VII of the Civil Rights Act of 1964. The panel majority stated that, where a company-wide seniority system exists, the only relevant consideration in determining whether the collective bargaining agreement should be re-

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formed is evidence directed at the *bona fide* character of the system: "that is, evidence directed either to the neutrality of the seniority system or evidence directed to ascertaining an intent or design to disguise discrimination."

The E.E.O.C. filed a petition for rehearing in the Court of Appeals arguing that evidence of unlawful hiring discrimination occurring after the effective date of Title VII was also highly probative of whether the use of the seniority system to determine layoffs violates public policy, as reflected in Title VII. When the court denied the petition, the E.E.O.C. filed a timely petition in this Court seeking review of that issue. No. 75-182, filed August 1, 1975.

Subsequently, Jersey Central filed a cross-petition for review of the panel majority's remand of the action, which permits the district court to receive evidence and to determine whether the seniority system used in the layoffs was designed or intended to disguise discrimination.

1. The cross-petition should be denied as untimely. The judgment of the Court of Appeals was entered January 30, 1975. A petition for rehearing by E.E.O.C. was denied March 4, 1975. On May 27, 1975, Mr. Justice Brennan extended the Commission's time for filing a petition for a writ of certiorari to and including August 1, 1975, and the Commission's petition was filed on that date. The cross-petitioners sought no extension of time to file a petition. Their cross-petition was not filed until September 24, 1975—almost nine months after the

aspect of the ruling of the Court of Appeals which they seek to have reversed, and 204 days after the Court of Appeals' denial of rehearing. The cross-petition is therefore untimely under 28 U.S.C. § 2101 (c).

The 90-day statutory period for the filing of a petition for a writ of certiorari in a civil case is jurisdictional. See *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Department of Banking* v. *Pink*, 317 U.S. 264. Neither the statute nor this Court's Rules make any exception for cross-petitions.

The cross-petition (at 2-3) seeks to rely on *Pierson* v. *Ray*, 386 U.S. 547, as authorizing the filing of untimely cross-petitions. Although the Court there granted an apparently out-of-time cross-petition, the cross-respondents did not suggest any jurisdictional defect in the cross-petition, and this Court did not address the issue either in its order granting certiorari (384 U.S. 938) or in its subsequent opinion in the case.[1]

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[1] Although the current edition of Stern and Gressman, *Supreme Court Practice* (1969), notes that *Pierson* v. *Ray* appears to depart from the normal practice, it reiterates that conditional cross-petitions usually must be filed within the statutory time period. "Normally, a cross-petitioner who seeks review only if the original petition is granted is subject to the same time requirements as the petitioner and must file his cross-petiiton within the same required time (usually 90 days) or obtain an extension of time in which to file the cross-petition, quite apart from what the petitioner may do in this respect" (*Id.* at 311).

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2. Even if this Court determines that the untimeliness of a cross-petition is not a jurisdictional defect and that the Court may in its discretion consider an out-of-time cross-petition on its merits, we submit that, in the absence of a Rule of this Court to the contrary, that discretion should be exercised only in exceptional circumstances where good cause is shown for the delay. There are no such exceptional circumstances here. The ruling of the Court of Appeals that the layoff provisions of the collective bargaining agreement could not violate Title VII unless the Commission (or any other party to the suit) demonstrated that the layoff system was intended or designed to disguise discrimination was set forth in the initial opinion of the Court of Appeals issued on January 30, 1975, almost nine months before the cross-petition was filed. The company has thus for a long time been aware that the issue of intention to discriminate remained in the case. Indeed in reply to questions posed by the district judge following the Court of Appeals decision, cross-petitioners wrote:

> The Court's remand allows the parties the opportunity, if desired, to offer evidence on the *bona fide* character of the company-wide seniority system. Irrespective of whether such evidence is presented or not, entry of partial summary judgment at this time is appropriate. I.e., absent evidence demonstrating that the seniority system is not bona fide, the seniority provisions of the collective bargaining agreement here involved shall be followed in the event of layoffs.

> As we understand the remand order and its explanation, the first stage of the evidentiary process would be considerably more narrow than the scope of Title VII. The inquiry would focus only on (1) the terms of the seniority provisions, i.e., is it facially neutral, and (2) evidence relevant to the question of intent to disguise the seniority system as a discriminatory device.

Thus the company, with full knowledge of the issues left open by the Court of Appeals decision, did not, until the cross-petition, take the position that the Commission is estopped from contesting the bona fides of the seniority system insofar as it may embody an intention to discriminate.

The only explanation for the delay in raising the issue offered by the company is that the Commission's petition presents "an issue quite different from, those issues presented to the courts below." The Commission's petition does no such thing. The question of whether layoffs by company seniority would violate, not only the conciliation agreement, but Title VII, was in the case from the beginning on the company's complaint which initiated this action. While the Commission urged both the District Court and the Court of Appeals not to decide the issue without a full development of the facts, the Commission has always made clear its position that, under certain circumstances, layoffs by company seniority may violate Title VII. Moreover, the specific aspect of that position with respect to the perpetuation of the effects of post-Act unlawful hiring practices was articulated in the Commission's petition for rehearing

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in the Court of Appeals. It could hardly have come as a surprise to the company that such a position would be brought before this Court if a petition for a writ of certiorari were filed.

3. In any event the petition presents no issue of merit. The company, in reply to the Commision's petition for a writ of certiorari, has asserted its theory that the Commission, by virtue of its signature to the conciliation agreement, is estopped from claiming that the seniority system perpetuates the effect of post-1965 unlawful discrimination in hiring. As we point out in our reply brief, this is not a proper interpretation of the conciliation agreement. Rather, since, as the district court found, the conciliation agreement did not deal with the question of general layoffs, the issue of whether the layoffs constitute a violation of Title VII is new matter, not covered by the conciliation agreement. It is therefore subject to judicial determination in a proper case under the express terms of the conciliation agreement, providing that the Commission does not waive its right to sue on issues not covered by the agreement. The issue of whether the seniority system embodies an intention to discriminate is even more clearly a matter not within the contemplation of the conciliation agreement and thus, as the Court of Appeals held, a matter to be determined by the district court.

It is therefore respectfully submitted that the cross-petition should be denied.

Respectfully submitted,

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LUTZ ALEXANDER PRAGER
Attorney

Equal Employment Opportunity Commission
2401 E Street, N.W.
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November 7, 1975

BLEED THROUGH

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum of the Equal Employment Opportunity Commission In Opposition were today mailed, postage prepaid, to the following counsel of record:

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November 7, 1975

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Respondents.

Cross-Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY BRIEF OF CROSS-PETITIONER, JERSEY CENTRAL POWER & LIGHT CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-465

JERSEY CENTRAL POWER & LIGHT CO.,

Cross-Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,

Respondents.

Cross-Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY BRIEF OF CROSS-PETITIONER, JERSEY CENTRAL POWER & LIGHT CO.

The Equal Employment Opportunity Commission ("EEOC") urges that the cross-petition filed by Jersey Central Power & Light Co. (the "company") be denied as untimely filed. It seeks to distinguish the treatment in

Pierson v. *Ray*, 386 U.S. 547, on the ground that no claim of jurisdictional defect was raised in that case. Obviously, jurisdictional defects are not cured by a party's failure to assert the deficiency. Thus, *Pierson* cannot be distinguished on that basis.

The EEOC also argues against discretionary consideration of the cross-petition on the ground that the company had ample time in which to raise its claim of estoppel and not only failed to do so in timely fashion, but implied to the District Court that the remand contemplated unlimited examination of the seniority system's bona fide character. The EEOC reprints portions of the company's letter to the District Court (pages 5-6 of its brief) which do not present a complete picture. We think it essential to place these excerpts in perspective.

By order dated February 3, 1975, the District Court posed a series of questions, framed in light of the January 30, 1975 remand, and asked the parties for assistance by responding ". . . if only in preliminary or tentative form subject to later revision, refinement or withdrawal". In one of its questions the court expressed concern that the Court of Appeals' decision did not extinguish all possible Title VII claims which individual employees might assert, and wondered if this fact precluded the entry of any form of declaratory relief. By letter dated February 7, 1975 the company submitted what were called "tentative" responses, one of which was a rather lengthy answer to the question above. That answer was addressed to the propriety of granting relief notwithstanding the possibility of subsequent Title VII actions by those not parties to this litigation. The EEOC has reprinted only a portion of that answer. (At the bottom of page 5).[1]

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[1] A complete statement of the question and answer appears in Appendix A.

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In a second question by the court, it observed that the controversy had arisen from contractual claims, but had been disposed of largely in terms of a Title VII rationale; it wondered if further proceedings would be limited to the scope of Title VII. A portion of the company's response is set forth by the EEOC. (At the top of page 6).[2] The point of the question, obviously, was whether or not any party now regarded as valid the contract theories previously espoused (and deemed controlling by the District Court). The company's answer simply summarized the essentials of the remand, thereby obliquely indicating that contract principles were inapplicable.

What the EEOC fails to recite is the court's question regarding how far back in time proffered evidence may reach. To that, the company responded: "Such inquiry ought not to involve events prior to the commencement date of the EEOC agreement."[3] This response and statement of position cast an entirely different light on those out-of-context excerpts now relied on by the EEOC as showing company awareness and acceptance of an open-ended inquiry of the seniority system's bona fides. The company's position regarding the effect of the conciliation agreement has not changed. The EEOC, however, has adopted a new theory of the case.

The EEOC now asserts for the first time that the seniority system is *per se* not bona fide:

> "It is our position that, whatever may be the situation with respect to pre-1965 discrimination, a seniority system which perpetuates post-1965 un-

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[2] A complete statement of the question and answer appears in Appendix B.

[3] A complete statement of the question and answer appears in Appendix C.

> lawful discrimination cannot, by its very nature, be deemed bona fide." (EEOC petition, page 12)

This was not the position of the EEOC when it petitioned the Court of Appeals for rehearing. At that time it said: "At issue here is not the seniority system *per se* but the use of that system to determine who is to be laid off." (Its brief, page 13). It sought not to invalidate the seniority system nor to unduly disrupt its operation; rather it sought to preserve the minority ratios achieved under the conciliation agreement (Id. page 14).

Finally, the EEOC argues that the cross-petition's reliance on estoppel is to no avail because the conciliation agreement did not encompass the question of layoffs. It cites the District Court's holding to that effect which seems rather surprising in view of the contrary holding of the Court of Appeals.

For the reasons submitted, the company requests that its cross-petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

On February 3, 1975 the District Court submitted a Memorandum and Order to all counsel. It read in part as follows:

> "The majority and concurring opinions of the United States Court of Appeals for the Third Circuit, filed January 30, 1975, have been received. The ruling calls for a remand to this court with directions:
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> 1. to vacate so much of the September 23, 1974 order as is inconsistent with the majority opinion; and
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> 2. to conduct such further proceedings, not inconsistent with the majority opinion, as may thereafter be required.
>
> So that the court may have the assistance of the parties in executing its duty on remand, each and all of them are requested to submit their views on the questions that are listed in this memorandum. Responses should be in the hands of the court on or before February 10, 1975, if only in preliminary or tentative form subject to later revision, refinement or withdrawal.
>
> . . .
>
> D. At the hearing here, the court raised the question whether the Local Unions, who are the recognized agents for *all* employees within the bargaining units, could properly take the adversary position that all layoffs are to be in strict accordance with the seniority clause, or whether it should ar-

> range to establish two committees of its members, one to represent the class of female and minority members and the other to represent the class of all other members, with the Local Unions providing the funds to meet the litigation expenses for the two groups. While the opinions of the Court of Appeals do not address this question explicitly, the majority opinion notes that the decision 'can obviously "affect and bind only the parties present in this litigation' (Majority Slip Opinion, p. 34), while the concurring opinion notes that even after final determination on remand here, 'other parties, such as employees affected by the current layoffs, are not foreclosed from bringing actions under Title VII or alternative statutes . . .' (Concurring Slip Opinion, page 1, footnote 1). Is this circumstance one that ought to result in a denial of any declaratory relief for inability to completely terminate the controversy in the absence of such other parties?"

In answer to the court's order, the company replied by letter dated February 7, 1975. Its response to the above question follows:

> "The Company submits the following tentative responses to the questions contained in the District Court's Memorandum and Order of February 3, 1975.
>
> . . .
>
> "D. The Court of Appeals has determined that the matter before it presents a justiciable controversy (Page 2, Footnote 5 and Page 16, majority opinion), that the requisite jurisdiction exists (Pages 14-

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16) and that the matter has sufficiently matured to permit a judicial determination (Pages 16-17). Neither the District Court in its September 23rd opinion nor the Court of Appeals was troubled by the absence, as parties, of others possibly affected by the layoff. The Court of Appeals specifically states that its decision can affect and bind only present parties (Page 34), and we detect no implication therein that the possible existence of other parties (which that Court obviously realized) would preclude a termination of the controversy as to present parties. It appears implicit that both the trial and appellate courts were satisfied that all necessary parties had been joined for purposes of determining the controversy presented. Otherwise, Rule 19(a), F. R. Civ. P., would have been properly invoked just as the District Court did invoke that rule to retain GSA and OFCC as necessary parties. Furthermore, the Court of Appeals specifically recognized the possibility of a subsequent action by an aggrieved party, citing *Alexander* v. *Gardner-Denver Co.* (Page 34), yet nothing in its conclusion or order suggests that the granting of the declaratory relief sought is inconsistent with that possibility.

The Court's remand allows the parties the opportunity, if desired, to offer evidence on the *bona fide* character of the company-wide seniority system. Irrespective of whether such evidence is presented or not, entry of partial summary judgment at this time is appropriate. I.e., absent evidence demonstrating that the seniority system is not bona fide, the seniority provisions of the collective bargaining agreement here involved shall be followed in the event of layoffs."

APPENDIX B

A second question posed by the District Court was as follows:

> "E. The determination here was grounded on the circumstance that the controversy arose out of two separate contractual undertakings, and that in the absence of any rule forbidding it, parties to a contract may obligate themselves to undertakings above and beyond those required by statute. While the opinions of the Court of Appeals recognize that the issues here arise from contractual obligations, much of its rationale is grounded on an analysis and interpretation of the statutory requirements of Title VII. Is it the view of the parties that any further proceedings here will be limited to the scope of Title VII?"

The company replied:

> "E. As we understand the remand order and its explanation, the first stage of the evidentiary process would be considerably more narrow than the scope of Title VII. The inquiry would focus only on (1) the terms of the seniority provisions, i.e., is it facially neutral, and (2) evidence relevant to the question of intent to disguise the seniority system as a discriminatory device. Evidence of disparate impact resulting because of prior discriminatory practices, typical evidence in Title VII cases, would not be admissable, or at least would not be probative according to the Court of Appeals (Pages 27-29). A finding that the system is not bona fide would not support a Title VII violation or remedy: it would simply open up a broader inquiry which is

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then within the scope of Title VII and limited thereto. A finding that the seniority system is *bona fide* would be conclusive and close out any further Title VII considerations."

APPENDIX C

A third question posed by the District Court was as follows:

> "H. In the context of item G,[1] how far back in time or history may any proffered evidence reach, in view of the facts that seniority status at any date rests on the then current collective bargaining agreement and that such agreements are usually of limited duration?"

The company replied:

> "H. Such inquiry ought not to involve events prior to the commencement date of the EEOC agreement."

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[1] "G. If any party contemplates the presentation of evidence that the seniority system violates Title VII, such as to permit it to be modified judicially as a remedy, what offers of proof *may* be made within the limits set out (Majority Slip Opinion, pp. 28-30, and especially footnote 54), and from among those that *may* be offered, what specific offers of proof *are* intended to be made?" (Emphasis in original).